

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

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**UNITED STATES of AMERICA**

**v.**

**HENRY GUTIERREZ,**

**Defendant.**

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**Criminal No.  
06-40043-FDS-2**

**ORDER ON MOTION  
FOR CLARIFICATION**

**SAYLOR, J.**

This is a petition for habeas corpus by a person in federal custody filed pursuant to 28 U.S.C. § 2255. On July 2, 2013, the Court issued an order directing the clerk to serve a copy of the petition upon the office of the United States Attorney and giving the respondent 21 days from the receipt of the order to file any responsive pleading. On July 15, petitioner inexplicably filed a notice of appeal as to the Court's service order. The government subsequently moved for clarification as to whether this Court retained jurisdiction over the matter.

Because the petitioner's notice of appeal is premature or otherwise constitutes an attempt to appeal a non-appealable order this Court, will retain jurisdiction over the matter. Although the normal rule is that a district court is divested of jurisdiction upon the filing of a notice of appeal, the First Circuit has held that "a district court can proceed, notwithstanding the filing of an appeal, if the notice of appeal is defective in some substantial and easily discernible way (if, for example, it is based on an unappealable order)." *United States v. Brooks*, 145 F.3d 446, 456 (1st Cir. 1998); *see also* 20 MOORE'S FEDERAL PRACTICE § 303.32[2][b][iv] (indicating that

certain patently defective notices of appeal do not transfer jurisdiction). Petitioner's notice of appeal presents such a situation.

For the foregoing reasons, the motion for clarification is GRANTED and the Court will retain jurisdiction over the petition. The respondent is directed to file any responsive pleading within 21 days of this order.

**So Ordered.**

/s/ F. Dennis Saylor  
F. Dennis Saylor IV  
United States District Judge

Dated: July 24, 2013